

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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DOUGLAS TERRA, LESLIE TERRA, )  
GARY F. EDMUNDSON, LEE MOORE, )  
CAROL MOORE, JAMES L. )  
KENNISON, AND MARJORIE L. )  
WEESNER, )  
Petitioners, )  
and )  
FRAN RECHT, )  
Intervenor-petitioner, )  
vs. )  
CITY OF NEWPORT, )  
Respondent, )  
and )  
VISTA LAND CORP, )  
Intervenor-Respondent. )

LUBA No. 98-036  
  
ORDER  
ON OBJECTIONS TO  
SECOND SUPPLEMENTAL  
RECORD

30 The record in this case was settled October 2, 1998. Terra v. City of Newport, \_\_\_ Or  
31 LUBA \_\_\_ (LUBA No. 98-036, Order On Objections to the Record, October 2, 1998). In  
32 our order, we rejected a record objection based on a site plan called "figure 1." Id. slip op at  
33 4. We held that petitioners had not established that figure 1 was placed before the final  
34 decisionmaker in this case, the city council. Id.

35 On December 3, 1998, after the parties had submitted their briefs in this appeal and  
36 approximately one month before oral argument, the city submitted a second supplemental  
37 record. The second supplemental record consists of a site plan dated February 1997 that, the  
38 city represents, is the "figure 1" that was the subject of an earlier record objection.

1           The parties appear to agree that the following events occurred. Figure 1 was  
2 originally attached to a geotechnical report that was submitted into the record before the city  
3 planning commission (commission). When the commission's decision was appealed to the  
4 city council, commission staff assembled and copied the record before it, and transmitted that  
5 copy of the record to the city council. In doing so, the commission staff inadvertently  
6 neglected to copy and transmit figure 1. The city council reviewed the commission's  
7 decision on the basis of the record before the commission.

8           Petitioners and intervenor-petitioner (jointly, petitioners) object to the second  
9 supplemental record, on the grounds that (1) figure 1 was not placed before the final decision  
10 maker during the local proceedings leading to the challenged decision, and thus is not part of  
11 the local record; and (2) filing of the second supplemental record after the parties had  
12 submitted briefing is untimely and prejudicial to petitioners' substantial rights.

13           In Salem Golf Club v. City of Salem, 27 Or LUBA 715 (1994), the city filed a  
14 supplemental record contemporaneously with its response brief, arguing that the items  
15 included in the supplemental record were items included in the record before the planning  
16 commission, and hence included in the record before the city council as a matter of law under  
17 local ordinances. The petitioners objected both to the merits of the supplemental record and  
18 its untimely filing. We agreed with the city that the items were included in the record before  
19 the city council as a matter of law under applicable local provisions. 27 Or LUBA at 718.  
20 Further, we rejected the petitioners' objection to the timeliness of the submission, explaining  
21 that "in ordinary circumstances," we would not allow a supplemental record to be filed after  
22 the petition for review had been filed, given the mandate in ORS 197.805 that time is of the  
23 essence in LUBA's review proceedings. 27 Or LUBA at 719. However, we noted that the  
24 case had already been delayed over a year due to the petitioners' failure to submit certain  
25 material, and that, under those "unique circumstances," we would allow delayed submission  
26 of the supplemental record. Id.

1           The present case differs from Salem Golf Club in two significant respects. First, in  
2 the present case the city provides no explanation why it believes figure 1 was or should be  
3 included in the record before the city council. Unlike the respondent in Salem Golf Club, the  
4 city does not contend that figure 1 was included in the record before the city council as a  
5 matter of law, pursuant to local code requirements, or that figure 1 was included in the record  
6 by any other means.<sup>1</sup>

7           Second, the city does not cite to any "unique circumstances" that would justify  
8 acceptance of a supplemental record over petitioners' objection at this late stage in the appeal,  
9 or that would justify a departure from the policy of expedited review provided in  
10 ORS 197.805. Accordingly, we sustain petitioners' record objections.

11           The record is settled as of the date of this order. OAR 661-010-0026(6) provides in  
12 relevant part that:

13           "If an objection to the record is filed, the time limits for all further procedures  
14 under these rules shall be suspended. When the objection is resolved, the  
15 Board shall issue an order declaring the record is settled and setting forth the  
16 schedule for subsequent events. \* \* \*"

17 Pursuant to OAR 661-010-0026(6), oral argument, the next event in this review proceeding,  
18 is scheduled for May 6, 1999, at 11:00 a.m.

19           Dated this 6th day of April, 1999.

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Michael A. Holstun  
Board Chair

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<sup>1</sup>The Board has held an item can become part of the local record if (1) it is physically placed before (and not rejected by) the decision maker prior to adoption of the final decision; (2) it is submitted to the decision maker through means specified in local regulations or in a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item be placed before the decision maker. Terrace Lakes Homeowners Assoc. v. City of Salem, 29 Or LUBA 600, 601 (1995).